

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. **78-1195**

JOHN TOKHEIM, MARY C. TOKHEIM and
FARMERS STATE BANK,
Petitioners,

v.

RONALD BLUME,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF IOWA

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF IOWA

The petitioners, John Tokheim, Mary C. Tokheim, and Farmers State Bank, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Iowa entered in this proceeding on August 31, 1978 and the order of the Supreme Court of Iowa denying further review which was entered on November 3, 1978. A stay order was entered by the Supreme Court of Iowa on November 9, 1978 to permit the filing of this petition.

OPINIONS BELOW

The unreported opinion of the Court of Appeals of Iowa appears in the Appendix hereto. No opinion was rendered by the Supreme Court of Iowa; the order denying

further review appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals of Iowa was entered on August 31, 1978. A timely application for further review was filed on September 18, 1978, and Petitioners' application was denied on November 3, 1978. An order of the Supreme Court of Iowa granting a stay of judgment for the purpose of filing this petition was entered on November 9, 1978. By the aforesaid denial of the petitioners' application for further review, the opinion and judgment of August 31, 1978 of the Court of Appeals of Iowa became the final judgment of the highest court of the State of Iowa.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether procedural due process was denied where a state appellate court affirmed a judgment on the basis of a new issue and accordingly unsupported fact finding that had theretofore never been pleaded, litigated, or in any manner raised in the litigation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Fourteenth Amendment.

Section 1 nor shall any State deprive any person of life,

liberty, or property, without due process of law; . . .

Statutes:

Section 684.1, Code of Iowa

2. Any civil or criminal action or special proceeding filed with the supreme court for appeal or review, may be transferred by the supreme court to the court of appeals by issuing an order of transfer

4. Any party to an appeal decided by the court of appeals may, as a matter of right, file an application with the supreme court for further review

STATEMENT OF THE CASE

A. Summary of the Facts

Ronald Blume, Respondent, will hereinafter be referred to as Respondent. As clarity demands, the individual Petitioners will be referred to as John Tokheim and Mary C. Tokheim, and The Farmers State Bank will be referred to as the Bank.

During 1972, Respondent became financially overextended, being unable to meet all of his obligations to John Tokheim, the Bank, and others. At a meeting between John Tokheim and Respondent in December, 1972, John Tokheim told Respondent that his indebtedness to the Bank and others was \$17,000 and that no additional funds could be advanced. In January, 1973, Respondent alleviated this dilemma by selling his interest in two Iowa farms, some grain and some crops in the

field to Mary C. Tokheim for \$74,235. This sale and the circumstances surrounding it constitute the basis for this litigation.

B. Course of the Proceedings

In June, 1974, Respondent commenced this action at law in the Iowa state court. An August, 1974 amended petition added an equitable claim for rescission of the contract of sale, and the case went to trial in May, 1976. During the trial, Respondent was forced to elect whether to continue to proceed at law or in equity, and the Respondent elected to proceed in equity for rescission. An advisory jury was retained. Throughout the pleading and trial stages of this case, Respondent claimed that he was entitled to the relief requested due to John Tokheim's allegedly fraudulent misrepresentation as to the amount of Respondent's debts to John Tokheim and the Bank.

In August, 1976, a judgment was entered for Respondent and rescission was ordered. Defense motions for judgment notwithstanding the verdict and for a new trial were denied, and a nunc pro tunc decree was entered in November, 1976. An appeal to the Supreme Court of Iowa was taken in a timely fashion by Petitioners.

Pursuant to §684.1 of the Code of Iowa, the Supreme Court of Iowa transferred this case to the Court of Appeals of Iowa, and in August, 1978, that court affirmed the judgment of the state trial court. However, it is the ground upon which that affirmance was based that forms the basis of this petition. An application for further review by the Supreme Court of Iowa was denied in November, 1978.

C. How the Federal Question is Presented

No federal question was presented in the pleading or trial stages of this action. In fact, no federal question was presented to the Court of Appeals of Iowa. However, on August 31, 1978, the date when the Court of Appeals of Iowa rendered its opinion in this action, a significant federal question involving Fourteenth Amendment procedural due process surfaced for the first time.

The opinion of the Court of Appeals of Iowa affirmed the judgment of the state trial court on the basis of an issue that had never been pleaded or tried, and made an unsupported fact finding thereon. The Petitioners had theretofore received no notice as to this issue and had been given no opportunity to defend against it.

More specifically, the case had been tried on the Respondent's claim of fraudulent misrepresentation as to the amount owed by Respondent to John Tokheim and the Bank. The Court of Appeals of Iowa affirmed on the basis of a fraudulent misrepresentation as to whom Respondent owed the money. The relevant portion of the opinion of the Court of Appeals of Iowa reads as follows: (See Appendix hereto)

"Tokheim told Blume his total bank indebtedness was approximately \$17,000. In reality Blume owed Farmers State for loans totaling \$8286 in principal (plus interest of \$1193). He owed John Tokheim \$6865 principal (plus interest of \$571) on two notes negotiated with Farmers State but subsequently

purchased 'privately' by John Tokheim in March, 1972. Tokheim did not disclose his substantial personal stake in Blume's 'bank' indebtedness during the negotiations." (Emphasis added)

The clear import of this statement by the Court of Appeals of Iowa is that although "in reality" Respondent was indebted in the amount of \$16,915 (certainly qualifying as "approximately \$17,000"), the lower court judgment was affirmed on the basis of John Tokheim's failure to disclose to Respondant that part of this indebtedness was owed to himself rather than to the Bank.

This issue of alleged fraud as to whom the money was owed was entirely new to the litigation at this point. Perhaps this novelty is best disclosed by examining the relevant portions of Respondent's state court petition. (The full petition is set forth in the Appendix hereto).

In paragraphs seven and eight, respectively, of Division I of Respondent's petition, he alleged that he "...owed the said Bank and defendants the following notes," and that he ". . . was not indebted to the defendants in the amount represented" (Emphasis added). In paragraph seven Respondent set out all of the notes that he owed to defendants, which list included in subparagraph (3) a "private note." Moreover, in paragraph two of Division II of Respondent's petition, it was alleged that the sale in issue ". . . was in payment of indebtedness to the bank and a private note"

Thus, it was clear from the commencement of this action that Respondent acknowledged indebtedness to the Bank and the "defendants" (Petitioners herein). In addition, the case was tried on the theory that Respondent did not owe the \$16,915 that John Tokheim had said that he owed, and which the Court of Appeals of Iowa agreed that was owed "in reality."

Aside from the state law issue of whether a failure to disclose to whom money is owed can constitute a fraudulent misrepresentation and form the basis for contract rescission, the Court of Appeals of Iowa introduced an entirely new issue in the case at this late point in time. In fact, this issue had not been pleaded or tried.

Petitioners contend that this is a denial of due process, and raised this federal question at the earliest opportunity under Iowa law. This federal question was raised on September 18, 1978 when the Petitioners filed in the Supreme Court of Iowa an application for further review of the decision of the Court of Appeals of Iowa. Said application constituted the first, last and only opportunity available to Petitioners for asserting their federal constitutional claim in the state courts of Iowa. On November 3, 1978, the Supreme Court of Iowa denied this application for further review. (See Appendix hereto). Thus, the federal question was raised in a timely and proper manner so as to give this Court jurisdiction to review the judgment on writ of certiorari.

REASONS FOR GRANTING THE WRIT

- A. Federalism Demands That Some Court, Either Federal Or State, Hear A Substantial Federal Question That Is Properly Raised In A Timely Manner

Only one opportunity under Iowa law was available for the review of Petitioners' due process claim since this claim arose as a result of the judgment of the Court of Appeals of Iowa. That opportunity resulted in summary disposition when the Supreme Court of Iowa denied Petitioners' application for further review pursuant to that court's discretionary authority under §684.1 of the Code of Iowa. Thus, the instant case is distinguishable from those state court cases where petitioners assert a federal claim throughout a state court proceeding and then ultimately seek but one more review in this Court.

Our system of federalism demands that some court, either federal or state, hear a substantial federal question that is properly raised in a timely manner. If review is denied by this Court, an unwarranted extension of the autonomy of state judiciaries will have occurred in that a substantial federal question will go unheard on its merits. In contrast to other areas of federal judicial deference to state judiciaries, the instant case presents an unusual situation. For example, when federal court abstention is ordered under Younger v. Harris, 401 U.S. 37 (1971) and its progeny, it is premised upon the understanding that the federal court plaintiff will have adequate opportunity to vindicate his federal rights in the state court proceeding. Similarly, when this Court has considered the availability of federal

habeas corpus, such as in Wainwright v. Sykes, 433 U.S. 72 (1977), deference to the state judiciaries has been shown on the theory that the state proceeding will be the "main event" for the assertion of both state and federal claims.

However, in the instant case, since the federal question was thrust upon Petitioners at a late stage indeed, the Petitioners have had no adequate opportunity to vindicate their federal rights in a "main event" at the state court level. The Court of Appeals of Iowa rested its decision on an issue and finding that had no support in the record. Sixty years ago, this Court in Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 473 (1918) stated that:

"But the question arises, whether the basis of fact upon which a state court rested its decision denying the asserted federal rights has any support in the record; for if not, it is our duty to review and correct the error."

Petitioners seek a reaffirmation of this principle. In times of deference to state judiciaries, it becomes increasingly important that this Court retains in proper circumstances its historical role as the ultimate voice on federal questions. The instant case presents such a circumstance.

- B. The Decision Below Is In Conflict With Applicable Decisions Of This Court

The import of the Supreme Court of Iowa's denial of discretionary review is to hold

that the decision by the Court of Appeals of Iowa did not deny Petitioners due process of law. This is not so.

The instant case is in direct conflict with Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930). Like the instant case, Brinkerhoff involved a due process claim that was inserted into the litigation solely as a result of the decision of the state appellate court. Only discretionary review existed at the state court level for review of this new due process claim, and such was denied without opinion. This Court granted certiorari to the Supreme Court of Missouri, and reversed and remanded on the ground that it was a violation of Fourteenth Amendment due process where the state appellate court had decided the merits on an issue that had theretofore never been a part of the litigation. Mr. Justice Brandeis, in writing for this Court in Brinkerhoff, stated that, "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." (Id. at 680).

Since most alleged denials of due process result from state legislative or administrative action, this Court has had but few occasions to review due process in the state judicial process itself. However, an historic pattern of review exists and should be continued in the instant case. In Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915), this Court found a denial of due process wherein a state appeals court transformed the litigated issues under the state constitution and the Fourteenth Amendment into a tender of

of an issue of fact respecting the status of the plaintiff as a stockholder. This Court stated:

"In doing this, the court in effect rendered judgment against him upon a matter that was not in fact litigated. To do this, without his consent - and the record shows no consent - is contrary to fundamental principles of justice." (Id at 426).

The due process principles enunciated in the Brinkerhoff and Coe cases was applied in a more modern context in Bouie v. City of Columbia, 378 U.S. 347 (1964), wherein a state appellate court affirmed a criminal trespass conviction by interpreting the state statute in an unforeseeable manner. This was held to violate the "fair warning" requirement of due process.

Thus, it is clear that in those rare instances where a state appellate process has stepped beyond the confines of the record by inserting a new issue into the litigation, this Court has reviewed the litigants' federally protected rights to notice and the opportunity to be heard. This historic protection should be continued in the instant case.

C. Judicial Due Process Cases Are By Definition Important Enough To Merit Review

It has been often heard that we are the most litigious people in the world. Whether true or not, it is unquestioned that our courts have become crowded. For many of our people, this crowding has produced a

distrust of our judicial system. However, from the inside of the law we know that our judicial system is extraordinarily committed to fundamental fairness. Few cases produce the kind of judicial due process question herein presented. When such a case arises, however, it implicates the very integrity of the state judicial process. Virtually by definition, such a case is important enough to merit review.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Iowa and the order of the Supreme Court of Iowa denying further review.

Respectfully submitted,

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Attorney for Petitioners

Of Counsel:

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Des Moines, Iowa 50311

A P P E N D I X

RULINGS BELOW

IN THE COURT OF APPEALS OF IOWA

| | | |
|---------------------|---|------------------|
| RONALD BLUME, |) | |
| |) | |
| Appellee |) | Filed August 31, |
| |) | 1978 |
| v. |) | |
| JOHN TOKHEIM, MARY |) | |
| C. TOKHEIM, and |) | 528 |
| FARMERS STATE BANK, |) | <u>2060104</u> |
| Charter Oak, Iowa |) | |
| |) | |
| Appellants. |) | |

Appeal from Crawford District Court -
R. Kent Martin, Judge.

Defendants - bank, bank vice-president,
and bank vice-president's wife - appeal
rescission of real estate contracts granted
on ground the conveyances were fraudulently
induced. - Affirmed.

Raymond E. Franck & Allen K. Nepper, of
Raun, Franck, Mundt & Nepper, Denison, for
Appellants.

Russell S. Wunschel, of Wunschel Law
Firm, Carroll, for Appellee.

Heard by Donielson, Acting C.J., and
Snell, Oxberger and Carter, J.J.

PER CURIAM

This is an appeal of the rescission of
real estate contracts granted to plaintiff
Ronald Blume. The trial court found Blume
was fraudulently induced by defendant Farmers

State Bank and the bank vice-president and cashier, defendant John Tokheim, to convey his farms to Tokheim's wife, defendant Mary C. Tokheim. We affirm.

In early January 1973, Blume approached his banker Tokheim for an additional bank loan of operating cash to keep his farming ventures solvent. Tokheim responded that he was in jeopardy of being called to task by the bank examiners for the overextension of credit to Blume and that Blume's farms were about to be "foreclosed on". Tokheim told Blume his total bank indebtedness was approximately \$17,000. In reality Blume owed Farmers State for loans totaling \$8286 in principal (plus interest of \$1193). He owed John Tokheim \$6865 principal (plus interest of \$571) on two notes negotiated with Farmers State but subsequently purchased "privately" by John Tokheim in March 1972. Tokheim did not disclose his substantial personal stake in Blume's "bank" indebtedness during the negotiations.

Tokheim reasons since Blume's total indebtedness was established at \$16,915.96 no misrepresentation occurred. The bank liability ledger showed 27 separate loans negotiated between the bank and Blume. The sum of Blume's various bank loans at any one time fluctuated markedly. It rose as high as \$13,500 on June 1, 1971, dropped to \$11,000 on February 14, 1972, further dropped to \$7990 in June 1972 and rose slightly to \$8286 in August of 1972. Obviously, Blume had exceeded a bank indebtedness of \$8286 for extended periods of time while banking with Farmers State.

Tokheim served as banker and advisor to Blume; in addition he, or his staff,

dispersed funds into and out of Blume's checking account as the various loan obligations came due or new loan proceeds were granted. Tokheim accepted the duties of a fiduciary toward Blume.

. . . where there exists a relationship of trust or confidence, and the trusted party has superior knowledge of the facts. . . . the superior party has a duty to disclose all material facts of which he is aware, or at least those favorable to his own position and adverse to the other.

First National Bank of Lenox v. Brown, 181 N.W.2d 178, 182 (Iowa 1970). Blume ultimately relinquished his farms and crops upon Tokheim's advice that his bank credit had dried up. Under the guise of disinterested and knowledgeable banker, Tokheim convinced Blume he had to sell. In this same guise, Tokheim stepped forward as the benevolent buyer. Blume negotiated without ever knowing that Tokheim's advice to sell out was likely nothing more than a strategem by Tokheim to recoup his own sizeable personal stake in Blume's bank indebtedness. John Tokheim's deceptions spawned the transfers. In equity this is fraud in the inducement. First National, supra at 184. The trial court properly granted rescission.

Farmers State and Mary C. Tokheim first claim Tokheim's statements were not made within the scope of his bank employment. The record defeats them. Tokheim, as the only officer with full-time banking duties, was Farmers State Bank to Blume and other

customers. His deceptive conduct was indivisible from the bank's conduct in this case. Mary C. Tokheim further urges she had no knowledge that the properties were secured by fraud. Whatever knowledge Mary C. Tokheim had, she accepted the benefits of her husband acting on her behalf to secure the farms in her name. She is in no position now to avoid rescission by claiming his acts were unauthorized. *Shannon v. Gaar*, 233 Iowa 38, 6 N.W.2d 304 (1942).

Farmers State Bank and Mary C. Tokheim in post-judgment motions urged there was not sufficient evidence to support assessment of punitive damages against them and that the jury should have assessed punitive damages separately rather than jointly. The defendants made no request that a determination be made of the "differing degrees of culpability or the existence or non-existence of actual malice on the part of the respective defendants," before the jury responded to Special Interrogatory Six. This interrogatory submitted to the jury Blume's entitlement to punitive damages from all defendants. We find these defendants failed to timely urge that punitive damages be assessed on a comparative culpability basis. This argument first surfaced in post-judgment motions. The tardiness in urging the issue precludes our review. *Jacobson v. Benson Motors, Inc.*, 216 N.W.2d 396, 405 (Iowa 1974); and rule 243(b), Rules of Civil Procedure. However, the actual malice question was urged in the motion for directed verdict and renewed at the close of all the evidence. We do, therefore consider this issue.

The bank and Mary C. Tokheim argue there was no actual malice on their part to justify such an exaction. A plaintiff

claiming that the defendants' maliciousness of conduct gives rise to the assessment of punitive damages need not show actual malice. *Syester v. Banta*, 257 Iowa 613, 628-29, 133 N.W.2d 666, 676 (1965). Upon a showing that defendants acted illegally or improperly with a complete indifference to the natural consequences of their acts and the rights of others, malice to support an exemplary damage award may be inferred. *Northrup v. Miles Homes, Inc. of Iowa*, 204 N.W.2d 850, 859 (Iowa 1973). On the record at trial reasonable men certainly could conclude Tokheim acted in utter disregard of Blume's reliance upon him. Indeed, that Tokheim subverted Blume's trust to his own ends. Tokheim's malice may be inferred from this showing. To recover exemplary damages from Farmers State for these wrongful acts of its vice president, John Tokheim, Blume had to establish that Tokheim's acts were fraudulent and that they occurred within the scope of his bank employment. This showing was made. Under *Northrup* nothing more had to be shown to support an assessment of punitive damages against Farmers State as a corporate entity.

As for Mary C. Tokheim, on January 11, 1973, two days after the farms were transferred to her, she issued a check for delinquent real estate taxes due on one of the farms for 1971 taxes payable in 1972. Attached to this check is the Monona County Treasurer's receipt of January 12, 1973: "Received of Ronald V. Blume by Mary C. Tokheim." Whatever else Mary C. Tokheim knew, she very quickly knew that the farms had been acquired, from whom, and that she must act swiftly to protect her newly-acquired interests. Under *Shannon v. Garr* her conduct ratified John Tokheim's fraudulent acts. Punitive damages were properly

assessed against Mary C. Tokheim upon this showing of her ratification. 22 Am. Jur. 2d Damages §258 at p. 351.

The other issues urged for reversal are without merit. Compliance with §639.38 is not a prerequisite to the bringing of an action for rescission. The Dioptron Co. v. Dimmitt, 245 Iowa 450, 62 N.W.2d 749 (1954) decision cited by the defendants deals with an equity action by a creditor seeking to collect his debtor's overdue account by establishing a lien upon real property allegedly conveyed to defraud creditors. It has no application to a case in which a titleholder is induced to transfer his land by a creditor's fraud.

The trial court properly retained the jury for specific and distinct findings of fact when after two days at trial the legal issues were dismissed and the plaintiff elected to pursue the rescission remedy. The trial court sitting in equity has long had the prerogative to refer any question of fact to the jury. Chamberlain v. Juppiers, 11 Iowa 513, 515 (1861).

Rule 194, Rules of Civil Procedure, gives the trial court discretion to order a jury view of the premises involved. We do not find any support for a claim of abuse of this discretion.

We affirm the trial court. Application may be made to the trial court for determination of the amount of rentals due Blume for the period expiring during the pendency of this appeal.

AFFIRMED.

DENIAL OF APPLICATION FOR FURTHER REVIEW

IN THE SUPREME COURT OF IOWA

| | | |
|---------------------------|---|-------------|
| RONALD BLUME, |) | |
| Plaintiff-Appellee- |) | |
| Resister, |) | No. 2-60104 |
| |) | |
| v. |) | O R D E R |
| |) | |
| JOHN TOKHEIM, MARY C. |) | |
| TOKHEIM AND FARMERS STATE |) | |
| BANK, Charter Oak, Iowa, |) | |
| Defendants-Appellants) |) | |
| Applicants. |) | |

After consideration by the court en banc, Justice Allbee not participating, defendants-appellants' application for further review is hereby overruled and denied.

Done this 3rd day of November, 1978.

THE SUPREME COURT OF IOWA

By _____
W. W. Reynoldson, Chief Justice

ORIGINAL STATE COURT PETITION

IN THE DISTRICT COURT OF IOWA

IN AND FOR CRAWFORD COUNTY

| | | |
|---------------------|---|-----------------|
| Ronald Blume, |) | |
| |) | |
| PLAINTIFF |) | |
| |) | |
| v. |) | |
| |) | PETITION AT LAW |
| John Tokheim, Mary |) | |
| C. Tokheim and |) | |
| Farmers State Bank, |) | |
| Charter Oak, Iowa |) | |
| |) | |
| DEFENDANTS |) | |
| |) | |

DIVISION I.

Plaintiff for cause of action states:

1. Plaintiff is a resident of Crawford County, Iowa.
2. Defendants, John Tokheim and Mary C. Tokheim, are residents of Crawford County, Iowa.
3. Defendant, Farmers State Bank is a banking corporation organized under the laws of the State of Iowa with its principal place of business in Charter Oak, Crawford County, Iowa.
4. On February 7, 1969, Plaintiff purchased from LaVerne Mordhurst the following described real estate on contract, to-wit:

A-8

A-9

East Half of the Northeast Quarter (E1/2NE1/4), Section Thirty-three (33), Township Eightyfour (84) North, Range Forty-three (43) West of the 5th P.M., Monona County, Iowa

for Twelve Thousand Dollars (\$12,000.00), payable One Thousand Dollars (\$1,000.00) down and Five Hundred Dollars (\$500.00) per year plus 6 1/2% interest on the balance.

5. On February 24, 1970, pursuant to a real estate contract recorded in Book 71, Page 327, in the office of the Recorder in and for Crawford County, Iowa, the Plaintiff purchased from Joe Lahr and Roberta Lahr the following described real estate to-wit:

Northeast Quarter (NE1/4) of Section Sixteen (16), Township Eighty-four (84) North, Range Forty (40) West of the 5th P.M., lying North of Highway running over and across said land, more particularly described as Lot One (1) in Subdivision of the Northeast Quarter (NE1/4) North, Range Forty (40) West of the 5th P.M., Crawford County, Iowa, containing 142.9 acres, more or less,

for Forty-two Thousand Dollars (\$42,000.00), payable One Thousand Dollars (\$1,000.00) on August 15, 1970; One Thousand Eight Hundred Dollars (\$1,800.00) plus interest on January 1, 1971, and like payments on the first day of each January thereafter.

6. On or about January 9, 1973, Plaintiff, pursuant to Bill of Sale, a copy of which is hereto attached, marked Exhibit "A", transferred to the Defendants certain

standing crops, together with 700 bushels of soybeans presently stored at the Charter Oak Grain Company at Charter Oak, Iowa, and further, by Quit Claim Deed, transferred all of his right, title and interest in and to the real estate contracts set forth in Paragraphs 4 and 5, to Mary C. Tokheim.

7. Said transfers were made on said date pursuant to a demand and representation by the Defendant, John Tokheim, as an officer of the Farmers State Bank, Charter Oak, Iowa, and as an individual and husband of the Defendant, Mary C. Tokheim, that the said Plaintiff then was indebted to the Farmers State Bank, Charter Oak, Iowa, in the sum of \$14,401.58, plus interest and claiming the Plaintiff then owed the said bank and Defendants the following notes, plus interest:

| NOTES | PRINCIPAL | INTEREST |
|------------|-----------|----------|
| a. 13026 | \$125.00 | \$13.53 |
| b. 13791 | 126.00 | 7.62 |
| c. 14039 | 300.00 | 10.73 |
| d. 13301 | 3179.93 | 281.43 |
| e. Private | 3685.50 | 289.27 |
| f. 13360 | 650.00 | 55.09 |
| g. 12073 | 1505.00 | 346.89 |
| h. 12424 | 3000.00 | 376.37 |
| i. 11427 | 1380.15 | 257.76 |
| j. 13079 | 450.00 | 125.49. |

8. That in truth and fact the Petitioner was not indebted to the Defendants in the amount represented by the Defendant, John Tokheim, several of the notes having been previously paid.

9. The Defendants fraudulently misrepresented to the Plaintiff the amount of his indebtedness to the Farmers State Bank

for the sole purpose of causing the Plaintiff to transfer all his right, title and interest in and to said real estate contracts together with the personal property.

10. All of the actions of the said Defendant, John Tokheim, were done with actual malice and ill will toward the Plaintiff and with the malicious design and purpose of injuring and damaging Plaintiff so that in addition to his actual damages Plaintiff is entitled to punitive and exemplary damages of at least \$50,000.00.

11. Said Defendant, John Tokheim, knew that said representations were false, but he intended thereby to deceive the Plaintiff and induce him to transfer said real estate contracts to the Defendant's wife, Mary C. Tokheim.

12. Accordingly, Plaintiff agreed to transfer said real estate contracts.

13. If the Defendant had stated the true condition of Plaintiff's indebtedness to Farmers State Bank, said farmland would not have been transferred and accordingly Plaintiff has been damaged by said fraudulent representations in the sum of not less than \$50,000.00.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, in the sum of \$50,000.00 actual damages, together with interest and Court costs, and \$50,000.00 punitive and exemplary damages.

DIVISION II.

Plaintiff for further cause of action states:

1. He realleges Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of Division I of this Petition.

2. At the time Plaintiff assigned said land contracts and transferred the personal property, Defendant, John Tokheim, represented to Plaintiff that said assignment and transfer was in payment of indebtedness to the bank and a private note and set forth the amounts due and owing and insisted Plaintiff make the assignments to satisfy said indebtedness.

3. Said Defendant made the statements knowing they were untrue, for the purpose of defrauding Plaintiff and inducing him to transfer all of his right, title and interest in and to the real estate contracts and personal property, intending Plaintiff to rely on said statements, which Plaintiff did.

4. Plaintiff did rely on said misrepresentations and believed them to be true and relied on the said Defendants' properly setting forth the amount of the indebtedness due and owing and was thereby induced to sign the transfers.

5. Plaintiff did not, in fact, owe several of the notes represented and thus failed to receive proper consideration for the transfer.

6. On discovering said fraud, Plaintiff promptly notified Defendant of his repudiation of said assignment.

7. By reason of said misrepresentations, Plaintiff has been damaged in the sum of \$50,000.00.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, in the sum of \$50,000.00 actual damages, together with interest and Court costs, and \$50,000.00 punitive and exemplary damages.

DIVISION III.

Plaintiff for further cause of action states:

1. He reallages all of Division I and Division II of this Petition.

2. At all times herein material, Defendant, John Tokheim, was an officer and agent of the Defendant, Farmers State Bank, Charter Oak, Iowa, and was acting within the scope of his employment.

3. At all times herein material, Plaintiff was a customer of the Farmers State Bank, Charter Oak, Iowa, both as a depositor and a borrower, and in such relationship confided with the Defendant, John Tokheim, and revealed all of his financial affairs. Thus, Plaintiff's relationship with the Defendant was a fiduciary relationship.

4. Because of said fiduciary relationship, Defendants were obligated to reveal fully and accurately to the Plaintiff all of his indebtedness with the Farmers State Bank, Charter Oak, Iowa, and to honestly and truthfully convey to the Plaintiff that even in the event of judgment on any of the notes, he would have time to convert

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his property into cash and make such payment as was necessary, rather than removing all of his livelihood as a farmer.

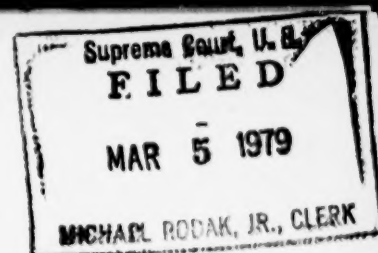
WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, in the sum of \$50,000.00 actual damages, together with interest and Court costs, and \$50,000.00 punitive and exemplary damages.

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BY _____

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ATTORNEYS FOR THE PLAINTIFF.



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1195

JOHN TOKHEIM, MARY C. TOKHEIM and
FARMERS STATE BANK,
Petitioners,

v.

RONALD BLUME,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF IOWA

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RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF IOWA

STATEMENT OF THE CASE

A. Summary of the Facts

In conformity with Petitioner's Brief, Ronald Blume will be referred to as Respondent and the individual Petitioners as John Tokheim, Mary C. Tokheim and the Bank.

Respondent Ron Blume is a laboring man with an eleventh grade education who purchased two farms on contract in 1969 and 1970, totalling 222 acres. Farmers State Bank is a family owned business in Charter Oak, Iowa, which is managed for all

practical purposes by John Tokheim in the day-to-day business of the bank. John Tokheim is a college educated man with many years banking experience and some legal education beyond his college degree; Mary C. Tokheim is his wife and is also a shareholder and a member of the board of directors of the bank.

Early in 1972, Respondent borrowed \$6,865.00 from the Bank. However, the two notes evidencing that debt were almost immediately purchased individually by John Tokheim from the bank and at the same time John Tokheim requested and received from Respondent assignments of the Respondent's equity in his two farm contracts. About a year later, in January of 1973, Respondent went to John Tokheim and asked if he could borrow some more money from the bank. John Tokheim refused, telling Respondent that he owed the Bank \$17,000.00 and that the sheriff was looking for Respondent to "foreclose" on Respondent's farm. Tokheim told Respondent that the latter was over-extended on his credit and that the bank examiners would call Tokheim to task if he loaned him any more money. Tokheim then told Respondent that things would be easier if Respondent would simply sign deeds to the farm over to John and Mary Tokheim and then Tokheim would pay all the bills outstanding and give Respondent \$2,000.00 cash. In response to these representations, Respondent did execute the deeds to his two farms and signed the Bill of Sale giving John and Mary Tokheim all of his crops.

B. Statement of the Proceedings Below

Respondent filed Petition at Law in the District Court of Iowa in and for Crawford County in June of 1974, as an action at law for \$50,000.00 actual damages and \$50,000.00 punitive damages jointly and severally. Almost immediately thereafter, Respondent amended his Petition adding a fourth division, this time praying for the equitable relief of cancellation of the deeds, return of the farms and grain, fair rental value of the farms from the date they were taken from him, and for full equity among the parties. The case eventually was decided upon this Division IV which was the only equity division of the Petition and is not set forth in Petitioner's Appendix but is set forth in the Appendix hereto. During the course of the trial, Division IV of the Petition was amended to include a prayer for punitive damages.

A jury was sworn and during the course of the proceedings, Respondent elected to submit the case for final determination in the equity division only, dropping the first three divisions from his Petition except to the extent the allegations therein were incorporated by reference in the equity claim. An advisory jury was retained and judgment and decree was rendered in favor of the Respondent granting him cancellation of the deeds and damages for the crops, the rental value, and punitive damages. After post-trial motions, an appeal was taken to the Supreme Court of Iowa which transferred the case to the Court of Appeals of Iowa under Section 684.1 of the Code of Iowa. The Court of Appeals of Iowa in a per curiam opinion affirmed the trial court. Petitioners filed

Application for Further Review to the Supreme Court of Iowa which was denied in November of 1978.

ARGUMENT

Petitioners' contention that the Respondent's pleading in the case below gave him no notice nor opportunity to defend the claim that John Tokheim "did not disclose his substantial personal stake in Blume's 'bank' indebtedness during the negotiations," must fail on the face of the pleadings alone. It is alleged in the Respondent's original Petition, below, that a fiduciary relationship existed between Petitioners and Respondent and it is specifically alleged, in paragraph 4 of Division III (as incorporated by reference in the equity division) as follows:

4. Because of said fiduciary relationship, Defendants were obligated to reveal fully and accurately to the Plaintiff all of his indebtedness with the Farmers State Bank, Charter Oak, Iowa, . . .
(Emphasis added).

The allegation of a fiduciary relationship and failure to reveal accurate information about Respondent's indebtedness was sufficient to give notice to Petitioners.

[T]he principal function of pleadings is to give the adverse party fair notice of the claim asserted in the form of a generalized

summary sufficient to allow that party to make an adequate response.

United States v. Metro Development Corp., 61 F.R.D. 83, 86 (1973)

Further, the issue of to whom the money was owed was raised repeatedly by Petitioners at trial and on appeal, and therefore, the issue was tried by consent and the Petitioners cannot now complain that they lacked notice. It is fundamental, hornbook law that a party who fails to take exception to evidence but instead consents to its admission or even offers it himself into evidence cannot complain.

It must be remembered that this cause was tried in the Iowa District Court and heard in the appellate courts of Iowa in equity, wherein review is de novo, both as to the facts and the law. Iowa R. App. P., rule 4; Blake v. Blake, 13 Iowa 40 (1862); State ex rel Turner v. Younker Bros., Inc., 210 N.W. 2d 550 (Iowa 1973). All appeals in equity are triable anew substantially as though the appellate court had original jurisdiction. Manning v. Ottumwa Auto Co., 210 Iowa 1182, 232 N.W. 501 (1930). The judgment on appeal may be based upon different grounds from that of the trial court and the judgment of the trial court will be affirmed even if the reviewing court disagrees with the grounds upon which the trial court based its decision. Myers v. Smith, 208 N.W. 2d 919, 921 (Iowa 1973); City of Des Moines v. Harvey, 243 N.W. 2d 606, 610 (Iowa 1976).

The action as tried below and as submitted to the Court of Appeals of Iowa was for cancellation of Quit Claim Deeds to farmland made by Respondent and for damages, based upon the alleged fraud of the Petitioners in inducing the transfer of the land by Respondent. This Court has stated:

The decision of the state court as to what should be deemed a fraudulent conveyance does not present any federal question, nor does the application by the court of the evidence in reaching that decision raise one. McKenna v. Simpson, 129 U.S. 506, 509, 9 S.Ct. 365, 367, 32 L.Ed. 771, 774 (1889).

Further, in a de novo review by the Court of Appeals of Iowa, principles of local and general law govern the determination, and such questions of law are not reviewable by writ to a state court in this Court. Avery v. Popper, 179 U.S. 305, 313 (1900). It was stated in Krammer v. Wilson, 195 U.S. 410, 416 (1904), in dicta, "to reverse the state court upon this point would be to hold that it improperly construed its own laws with reference to fraudulent conveyances." This Court has consistently refused to grant jurisdiction in equity cases involving alleged fraudulent conveyances. See, e.g., Phillips v. Mitchell, 248 U.S. 531 (1918) and cases cited thereunder.

Petitioners' contention that the Court of Appeals of Iowa injected a different theory of fraud into the determination is untenable. The Decree of the trial court states in part:

The Court finds in accordance with the Special Interrogatories found by the jury that false statements were made by John Tokheim to Ronald Blume concerning his indebtedness or willingness of the defendants to pay all outstanding debts of the plaintiff as a statement of fact . . .
(Emphasis added)

Thus, the basis of the trial court's determination was not that John Tokheim made false statements about the total amount owing, but rather that he made false statements "concerning his indebtedness". The opinion of the Iowa Court of Appeals (set forth in Petitioners' Appendix) recites other affirmative false statements by John Tokheim, for example, that Tokheim was fearful the bank examiners would chastise him for the over extension of credit to Blume and that Blume's farms were about to be "foreclosed on".

Beyond the affirmative misstatements by John Tokheim to Respondent, there most definitely was a failure of Tokheim to reveal his stake in the Respondent's indebtedness. Petitioners' describe this fact as falling under the category of "failure to disclose," but in the present cause it does not matter whether one categorizes Tokheim's breach of duty in the negative (silence) or in the affirmative (misstatements). As

found by the trial court and the Court of Appeals of Iowa, and not contested on this appeal, John Tokheim and the Farmers State Bank occupied a fiduciary relationship in regard to the Respondent's business affairs. Because of the superior relationship that existed between the parties, actionable fraud may be established either by affirmative misstatement or by the absence of a statement. First National Bank in Lenox v. Brown, 181 N.W. 2d 178, 182 (Iowa 1970). Whether one views the record as showing that John Tokheim told Respondent, "you owe the bank about \$17,000.00 . . .," or as a failure to disclose where Tokheim did not tell Respondent, "you owe John Tokheim \$6,865.00 and you owe the bank another \$8,286.00. . ." the result is still the same, namely, a breach of the confidential relationship and corresponding duty owed by Petitioners to Respondent.

In summary, the record supports the finding by the advisory jury, the trial judge, the unanimous Court of Appeals of Iowa and the Supreme Court of Iowa that Petitioners perpetrated a fraud upon Respondent to induce him to convey the land to Petitioners, and all issues were before the courts below in making their determination. The Court of Appeals of Iowa was within its equity powers in the de novo review to expand upon the trial court's finding of fraud: the facts and law applicable to the case were not changed by the opinion of the Court of Appeals of Iowa. No federal question of any substance is presented for review.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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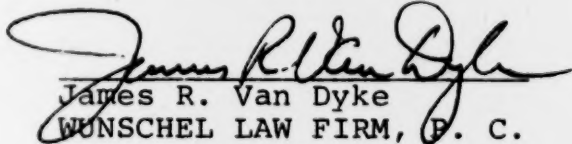
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify on the 2nd day of March, 1979, I did serve the within Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal of Iowa on all other parties to this appeal or review by mailing 3 copies thereof to the following respective counsel for said parties:

| | |
|--------------------|------------------------|
| Ray Franck | Robert C. Hunter |
| 203 N. Main Street | Drake University Law |
| Denison, Ia. 51442 | School |
| | Des Moines, Iowa 50311 |

in full compliance with the provisions of Rule 33, Supreme Court Rules.


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A P P E N D I X

AMENDMENT TO PETITION

IN THE DISTRICT COURT OF IOWA
IN AND FOR CRAWFORD COUNTY

RONALD BLUME,

PLAINTIFF

V.

JOHN TOKHEIM, MARY
C. TOKHEIM and
FARMERS STATE BANK,
Charter Oak, Iowa

DEFENDANTS

AMENDMENT TO PETITION

Plaintiff amends his Petition now on file
by adding thereto the following as Division
IV:

"Plaintiff for further cause of action
in equity states:

1. He realleges Paragraphs 1, 2, 3, 4,
5, 6, 7, 8, 9, 11, and 12, of Division I.

2. He realleges Paragraphs 2, 3, 4, 5,
6, of Division II.

3. He realleges Paragraphs 2, 3 and 4
of Division III.

4. All of said representations were
made by the Defendant, John C. Tokheim to
induce Plaintiff to make, execute and
deliver Exhibit "A" attached to the original

Petition and Exhibits "B" and "C", which are attached hereto and made a part hereof, the same being Quit Claim Deeds to the following described real estate, to-wit:

Northeast Quarter of Section Sixteen (16), Township Eighty-four (84) North, Range forty (40) West of the 5th P.M. lying North of Highway running over and across said land more particularly described as Lot One (1) and subdivision of the Northeast Quarter of Section Sixteen (16), Township Eighty-four (84) North, Range forty (40) West of the 5th P.M., Crawford County, Iowa,

containing 142.9 acres more or less dated January 9, 1973 to Mary C. Tokheim and a Quit Claim Deed to the following described real estate, to-wit:

East Half of the Northeast Quarter of Section thirty-three (33) Township Eighty-four (84) North, Range forty-three (43) West of the 5th P.M., Monona County, Iowa

to Mary C. Tokheim, dated January 9, 1973.

5. In reliance of said representation, Plaintiff executed said Instruments and was defrauded in the inception and therefore is entitled to the return of all of the assets allegedly assigned on Exhibits "A", "B", and "C".

6. Plaintiff now tenders full equity in the premises and offers restoration to Defendants what they had before the Instruments labelled "A", "B" and "C" were signed.

7. On Plaintiff's discovery of the misrepresentation, Plaintiff demanded a cancellation of the Instruments and the return of the money paid in exchange for possession.

8. By reason of the confidential relationship between Plaintiff and the Defendant, John Tokheim, as officer and agent for Farmers State Bank, Charter Oak, Iowa, and without independent advise or assistance, Plaintiff executed said Instruments and said transaction was grossly unfair, and said Deeds were obtained from Plaintiff by some manner of fraud, influence and advantage arising therefrom.

9. The consideration for the transactions was wholly insufficient and inequitable.

WHEREFORE, Plaintiff prays that said contracts, namely exhibits "A", "B", and "C" be cancelled; that he be released from apparent obligation thereof; that he have judgment against the Defendants for the fair rental value of said premises since the date of taking with interest from the date of said Instruments and costs and for accounting of all matters above mentioned and any other matters which maybe incident thereto, and for judgment for any additional sum which such accounting may show due him; that he be restored to the full ownership of the said personal property and real estate upon

paying the Defendants any amounts they have paid to him or third persons in payment of said property, which he now tenders and offers to pay; that the Court do full equity to each party and give such relief as may be equitable in the premises."

WUNSCHEL LAW FIRM, P. C.

/s/ Russell S. Wunschel

RUSSELL S. WUNSCHEL

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ATTORNEYS FOR THE PLAINTIFF.

STATE OF IOWA)
) ss.
CARROLL COUNTY)

I, Ronald Blume, on oath do depose and state that I am the Plaintiff in the above entitled matter; that I have read the foregoing Amendments and that the allegations and statements therein contained are true and correct as I verily believe.

/s/ Ronald Blume

Ronald Blume

Subscribed and sworn to before me by the said Ronald Blume on this 17 day of August, 1974.

/s/ Russell Wunschel

Notary Public In and For
Said County and State.

Original filed. Copy sent to:

Ray Franck
Attorney at Law
203 North Main
Denison, Iowa